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No. 99-527

In The Supreme Court of the United States

MATTHEW J. RYAN, ROBERT C. JUBELIRER, JESS M. STAIRS and JAMES J. RHOADES,

Petitioners,

v.

DAVID POWELL, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

DANIEL J. POPEO
PAUL D. KAMENAR
(*Counsel of Record*)
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., N.W.
Washington, DC 20036
(202) 588-0302

Counsel for Amicus Curiae

Date: November 3, 1999

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INTERESTS OF AMICUS CURIAE[1]

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters nationwide. WLF regularly appears before federal and state courts to promote economic liberty, free enterprise principles, and a limited and accountable government. To that end, WLF has appeared before this and other federal and state courts in numerous cases involving excessive and unlawful government regulation.

In particular, WLF has regularly appeared before this Court and other appellate courts in cases interpreting our nation's civil rights laws and the Equal Protection Clause of the U.S. Constitution. *See, e.g., Bush v. Vera*, 517 U.S. 952 (1996); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). More importantly, WLF was the only amicus to file a brief supporting the petitioners in *Seif v. Chester Residents Concerned for Quality Living*, 118 S. Ct. 2296 (1998), *vacated as moot*, 119 S. Ct. 22 (1998). In *Chester*, while the petitioners argued that Congress did not intend to provide a private right of action under Title VI, WLF further argued that Title VI of the Civil Rights Act of 1964 only barred intentional discrimination. Consequently, the Title VI regulations at issue in *Chester*, the Environmental Protection Agency's Title VI

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[1] Pursuant to Supreme Court Rule 37.6, WLF hereby states that no counsel for a party in this case authored this brief in whole or in part, and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief. Counsel for the parties have consented to the filing of this amicus brief; those written consents have been filed with the Clerk. WLF also intends this brief as a support of the petitioners in *Ridge v. Powell*, No. 99-574, who were the state defendants in this underlying case, and whose petition presents essentially identical issues.

"Environmental Justice" regulations, were unlawful to the extent those regulations barred actions that had a discriminatory effect. In short, the issue WLF argued in *Chester* is identical to the one that is now squarely presented to the Court in this petition.[2] WLF thus brings a broader perspective to the issues in this case than that presented by the parties in this action.

STATEMENT OF THE CASE

In the interest of judicial economy, WLF hereby incorporates by reference the Statement contained in the Petition for a Writ of Certiorari.

In brief, the plaintiffs challenge the entire legislative system for funding public education in the Philadelphia School District and other school districts in Pennsylvania, arguing that the funding system has a discriminatory effect on minority students, and therefore, violated Title VI of the Civil Rights Act of 1964. The court of appeals held that the Section 602 of Title VI provided a private right of action, and that the regulations promulgated by the Department of Education prohibiting actions that have a discriminatory effect, 34 C.F.R. § 100.3(b)(2), were valid. In so ruling, the court of appeals essentially adopted the reasoning of its vacated decision in *Chester Residents*

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[2] WLF also supports the other two issues presented in the petition, particularly the question as to whether Congress intended to create a private right of action under Section 602 of Title VI. However, WLF will focus its brief on the first question presented regarding the validity of the discriminatory effect regulations.

Concerned for Quality Living v. Seif, 132 F.3d 925 (3d Cir. 1997).

REASONS FOR GRANTING THE PETITION

I. WHETHER SECTION 602 OF TITLE VI AUTHORIZES FEDERAL AGENCIES TO PROMULGATE DISCRIMINATORY EFFECT REGULATIONS IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE DECIDED BY THIS COURT

This case presents an important question concerning whether a federal agency may validly promulgate a regulation under Section 602 of Title VI of the Civil Rights Act, 42 U.S.C. § 2000d-1, using a discriminatory effect standard when the statutory and constitutional authority under which the agency acts reaches only cases of intentional discrimination. This Court has yet to squarely address that question, although it has made statements in several decisions which have led lower courts, such as the Third Circuit below, to erroneously surmise that a federal agency may do so.

In particular, the Third Circuit and numerous other lower federal courts have wrongly interpreted this Court's decisions in *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983), and *Alexander v. Choate*, 469 U.S. 287 (1985), as holding that agency regulations under Title VI which incorporate a discriminatory effect standard are valid. So pervasive is the error warranting this Court's review that eight other federal courts of appeal have assumed that such agency regulations are valid, even though this Court has never squarely addressed the issue.

Most recently, in *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992), this Court noted that agency regulations under Title VI did *not* extend beyond the protection provided by the Fourteenth Amendment, but the Third Circuit ignored this Court's admonition under the mistaken belief that the Court had settled the issue in *Guardians* and *Alexander*. Because federal agencies may not issue Title VI regulations incorporating a discriminatory effect test, the Third Circuit clearly erred in finding a private right of action to enforce such regulations.

Therefore, absent this Court's review, lower federal courts will continue to erroneously allow federal agencies to engage in a lawmaking function by extending Title VI prohibitions to allegations of discriminatory effect. This would represent a dramatic and unwarranted expansion of federal agency power to determine what types of allegedly discriminatory conduct warrant legal proscription.

Because Title VI applies broadly to "every Federal department and agency which is empowered to extend Federal financial assistance to any program or activity," the potential impact of this issue is substantial. Numerous federal agencies, in addition to the Department of Education, have promulgated discriminatory effect regulations, ostensibly pursuant to Title VI. For example, the Environmental Protection Agency's Title VI regulations, 40 C.F.R. § 7.35(b), prohibit State environmental authorities from issuing permits to companies that wish to locate and operate their facilities in geographical areas that may have a discriminatory effect on minorities. Thus, even if the company meets or exceeds all federal and state pollution standards and requirements, the mere siting of the plant in a minority area could violate the EPA's controversial and vague "Environmental Justice"

regulations. *See also* 10 C.F.R. §§ 4.12(b), (c) (Department of Energy); 24 C.F.R. § 1.4(b)(2)(i) (Department of Housing and Urban Development); 49 C.F.R. § 21.5(b)(2) (Department of Transportation).

II. THE COURT OF APPEALS MISINTERPRETED THIS COURT'S *GUARDIANS* AND *ALEXANDER* DECISIONS

The court of appeals erroneously assumed, based upon a misreading of this Court's prior decisions, that discriminatory effect regulations promulgated by agencies pursuant to Section 602 of Title VI are valid exercises of their authority. As will be seen, this Court has not so held, and, in fact, a recent decision of this Court has cast this proposition into considerable doubt.

Consideration of whether the Department of Education (DOE) could validly incorporate a discriminatory effect standard must begin with the Constitution and the agency's statutory authority, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*[3] This Court has held

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[3] Section 601 of Title VI provides, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000(d).

Section 602 of Title VI provides, in pertinent part, that:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or

that the Fourteenth Amendment to the Constitution prohibits only instances of intentional discrimination, and does not prohibit instances of discriminatory effect. *Washington v. Davis*, 426 U.S. 229 (1976). In turn, this Court has likewise determined that Title VI's protection extends no further than the Fourteenth Amendment, and thus, Title VI itself does not prohibit instances of discriminatory effect. *Fordice*, 505 U.S. at 732 n.7; *Guardians*, 463 U.S. at 608, n.1 (Powell, J., concurring); *Regents of Univ. of California v. Bakke*, 438 U.S. 281, 284-87 (1978). Thus, as the Third Circuit acknowledged, both the Constitution and Title VI itself, which provided the authority for the DOE regulations at issue, protect only against instances of discriminatory intent.

Having properly acknowledged the limited scope of protection provided by the Constitution and the relevant statutory authority, the Third Circuit then embarked on a misguided analytical detour, based on a misreading of this Court's decisions. The Third Circuit reasoned, as it did in its vacated *Chester* decision, that this Court's decisions in *Guardians* and *Alexander* held that an agency's discriminatory effect regulation under section 602 is a valid exercise of its authority. However, properly read, neither

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> activity, by way of grant, loan, or contract . . . is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

42 U.S.C. § 2000d-1.

of these decisions encompass such a broad and erroneous holding.

Indeed, as the Third Circuit acknowledged, *Guardians* did *not* answer whether a private right of action exists under discriminatory effect regulations promulgated under section 602. *Guardians* involved an allegation that a last hired-first fired policy for lay-offs of police officers had a disproportionate effect on black and Hispanic police officers because officers were hired in order of their examination scores, and the examinations allegedly discriminated against minorities. *Guardians*, 463 U.S. at 584-85. The plaintiffs alleged that the policy violated Titles VI and VII of the Civil Rights Act, as well as the Fourteenth Amendment and other laws. *Id.* at 586. As to the claim for relief under Title VI, the Second Circuit had denied relief on the grounds that proof of discriminatory intent was required. *Id.* at 588. This Court rendered a deeply divided decision which affirmed the Second Circuit's *denial* of relief under Title VI.

The Third Circuit in this case misread *Guardians* as "holding" that discriminatory effect regulations are valid exercises of their authority. To the contrary, a plurality of four justices in *Guardians* stated that discriminatory effect regulations were not a valid exercise of agency power. *Id.* at 611, n.5 (Powell, J., concurring in judgment); *id.* at 612 (Rehnquist, J., concurring in judgment and joining in Part II of Justice Powell's opinion); *id.* at 614-15 (O'Connor, J., concurring in judgment). Three justices stated that discriminatory effect regulations were valid even though Title VI itself required discriminatory intent. *Id.* at 644-45 (Stevens, J, dissenting). Justice Marshall stated that a discriminatory effect standard was permissible under either Title VI or the agency regulations. *Id.* at 623-24

(Marshall, J., dissenting). Justice White stated that only noncompensatory, prospective relief was available under either Title VI or its regulations, and thus that the Second Circuit's denial of compensatory relief should be affirmed. *Id.* at 592-94. Justice White proceeded in *dictum* to state that a discriminatory effect standard was permissible under Title VI, but that *dictum* played no part in the Court's holding. *Id.* Properly read, the holding of *Guardians* is that there is no cause of action for compensatory damages for allegations of discriminatory effect under either Title VI or agency Title VI regulations, and the Third Circuit's suggestion of a broader holding is simply incorrect.

In support of its decision, the Third Circuit cited this Court's decision in *Alexander*, but, again, *Alexander* likewise contains no such holding, nor could it alter the limited holding of *Guardians* after the fact. *Alexander* did not involve Title VI, but rather the Rehabilitation Act. The plaintiffs in that case were Medicaid recipients who sought declaratory and injunctive relief from a state's reduction in the number of inpatient hospital days that the state's Medicaid program would pay on behalf of the recipients. *Alexander*, 469 U.S. at 289. The plaintiffs alleged that the state's reduction had a discriminatory effect on the handicapped and violated Section 504 of the federal Rehabilitation Act and its implementing regulations.

The unanimous and limited holding of this Court was that the plaintiffs' allegations were not cognizable under the Rehabilitation Act or its implementing regulations. *Id.* at 309. The Third Circuit read *Alexander* far more broadly, based upon the following passage from this Court's opinion, which stated:

> In *Guardians*, we confronted the question whether Title VI of the Civil Rights Act of 1964 * * * which prohibits discrimination against racial and ethnic minorities in programs receiving federal aid, reaches both intentional and disparate-impact discrimination. No opinion commanded a majority in *Guardians*, and Members of the Court offered widely varying interpretations of Title VI. Nonetheless, a two-pronged holding on the nature of the discrimination proscribed by Title VI emerged in that case. First, the Court held that Title VI itself directly reached only instances of intentional discrimination. Second, the Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI. *In essence*, then, we held that Title VI had delegated to the agencies *in the first instance* the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts.

Alexander, 469 U.S. at 292-94 (emphasis added) (citation omitted).

Of course, as is made clear by the previous discussion of *Guardians*, that case did not "hold" that a disparate impact claim could be pursued through agency regulations under Title VI, and any discussion of that subject in *Guardians* was *dicta*. Moreover, this after-the-fact explanation of *Guardians* in *Alexander* was *dicta* twice over, as *Alexander* did not even involve a Title VI claim

and the discussion was irrelevant to the result in that case. Indeed, the *Alexander* Court reversed the lower court's ruling that the plaintiffs had established a prima facie violation of section 504.

Thus, the Third Circuit erred when it read this Court's decisions in *Guardians* and *Alexander* as binding precedent for the validity of agency discriminatory effect regulations. Further, since those decisions, this Court has not held that such regulations are valid. To the contrary, this Court's more recent statement in *Fordice* raises the question which the Court should address in this case, specifically, whether such discriminatory effect regulations are valid to the extent they purport to reach conduct not proscribed by Title VI and the Fourteenth Amendment.

In *Fordice*, this Court addressed the correct legal standard for evaluating a state's compliance with the Equal Protection Clause in the context of school desegregation. In particular, the Court considered the standard to be applied to determine if a state had eradicated policies and practices traceable to a history of *de jure* segregation in a public university system. *Fordice*, 505 U.S. at 723-24, 727-28.

In its opinion, this Court made the following statement with regard to the private plaintiffs' Title VI claim:

> Private petitioners reiterate in this Court their assertion that the state system also violates Title VI, *citing a regulation* to that statute which requires States to "take affirmative action to overcome the effects of prior discrimination." *Our cases make clear, and the parties do not disagree, that the reach of Title VI's protection*

> *extends no further than the Fourteenth Amendment.* We thus treat the issues in these cases as they are implicated under the Constitution.

Id. at 732, n.7 (emphasis added) (citations omitted).

The Third Circuit in *Chester* recognized the obvious implication of that statement, commenting: "[h]idden within the Court's statement may be an indication that implementing regulations, such as the EPA's, that incorporate a discriminatory effect standard are invalid, because they extend further than the Fourteenth Amendment." *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925, 931 n. 9 (3d Cir. 1997). However, the court dodged the statement's implications, which are assuredly not hidden, by stating, "we do not believe that the Court would overturn *Guardians* and *Alexander* in such an oblique manner." *Id.* Of course, as is clear from the previous discussion, there was no such holding in *Guardians* and *Alexander* which needed overturning. The Third Circuit simply misread the breadth of this Court's decisions in *Guardians* and *Alexander*, and failed to heed an obvious warning sign from this Court in *Fordice*.

Just as this Court has held that Title VI extends no further than the Fourteenth Amendment, similarly, an agency regulation such as that at issue in this case could extend no further. An administrative agency is not free to proscribe otherwise lawful conduct through a regulation simply because it can be said that the regulation arguably furthers one of the purposes of an enabling statute. Such policy judgments are for the Congress to decide, and when the Congress decides that a purpose of the statute will be

accomplished by proscribing certain conduct, a federal agency is not free to upset the congressional compromise by proscribing even more conduct in the name of furthering one of the statute's purposes. As Justice O'Connor stated in her concurring opinion in *Guardians*:

> An administrative agency is itself a creature of statute. Although the Court has stated that an agency's legislative regulations will be upheld if they are "reasonably related" to the purposes of the enabling statute * * * we would expand considerably the discretion and power of agencies were we to interpret "reasonably related" to permit agencies to proscribe conduct that Congress did not intend to prohibit. "Reasonably related to" simply cannot mean "inconsistent with."

Guardians, 463 U.S. at 614-15 (O'Connor, J., concurring).

This is not a case where room for agency discretion in defining the scope of prohibited conduct was necessary because it was impractical for Congress to enact specific limitations. Within constitutional limits, Congress could have determined that the dangers of discrimination warranted extending Title VI protections beyond instances of intentional discrimination. That it did not do so must be regarded by this Court as a deliberate policy choice, and not as a deferral to administrative agencies to make the decision instead. The difference between prohibiting discriminatory intent and discriminatory effect represents precisely the type of broad public policy decision which rests in the hands of our elected legislatures, and not administrative agencies.

This Court has determined that Congress, in enacting Title VI, intended to extend the Fourteenth Amendment's proscription of intentional discrimination by government to private parties receiving federal funds. *Bakke*, 438 U.S. at 284-87 ("[i]n view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment"); *see also id.* at 328-29 ("[t]he history of Title VI . . . reveals one fixed purpose: to give the Executive Branch of Government clear authority to terminate federal funding of private programs that use race as a means of disadvantaging minorities in a manner that would be prohibited by the Constitution if engaged in by government.") (Brennan, J., concurring in judgment and dissenting in part). Moreover, this Court noted that Congress' refusal to more specifically define "discrimination" in Title VI evidenced Congress' intent that the term was to be defined by the scope of the constitutional prohibition. *Id.* at 286-87. That being the case, it is certainly beyond the power of an administrative agency to extend the reach of the statute further.

Moreover, if this Court were to hold that Title VI, by authorizing federal agencies to "effectuate the provisions of section 2000d of this title" by issuing regulations "consistent with achievement of the objectives of the statute authorizing the financial assistance," delegated to agencies the decision-making authority to prohibit all manner of discriminatory effects when Title VI itself prohibited only instances of discriminatory intent, it would approve a dramatic delegation of Congress' lawmaking power in violation of the nondelegation doctrine. That doctrine continues to serve several essential purposes and is vital to ensuring that the power to make law cannot be exercised by anyone other than Congress. *See American Trucking*

Associations v. EPA, 175 F.3d 1027 (D.C. Cir. 1999), *reh'g denied*, __ F.3d ___, (Oct. 29, 1999).

As Chief Justice Rehnquist stated in *Industrial Union Dep't, AFL-CIO v. Am. Petroleum Institute*, 448 U.S. 607 (1980):

> First, and most abstractly, it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will. Second, the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an "intelligible principle" to guide the exercise of the delegated discretion. Third, and derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.

Id. at 685-86 (Rehnquist, J., concurring) (citations omitted).

CONCLUSION

For these reasons and those stated in the respective petitions in this case, this Court should grant review of the lower court's decision in order to correct a serious error in the interpretation of Title VI and this Court's precedents.

Respectfully submitted.

DANIEL J. POPEO
PAUL D. KAMENAR
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., N.W.
Washington, DC 20036
(202) 588-0302

Counsel for Amicus Curiae

Date: November 3, 1999